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Attorneys for Defendant
TWIN CITY FIRE INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CROWLEY MARITIME CORPORATION,

Plaintiff,

vs.

FEDERAL INSURANCE COMPANY; TWIN CITY FIRE INSURANCE COMPANY; RLI INSURANCE COMPANY; and DOES 1-20, inclusive,

Defendants.

Case No: CV-08-00830 SI

[Hon. Susan Illston]

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT TWIN CITY FIRE INSURANCE COMPANY'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF CROWLEY MARITIME CORPORATION'S COMPLAINT

DATE: April 7, 2008
TIME: 9:00 a.m.
PLACE: Courtroom 10, 19th Floor

In connection with Defendant Twin City Fire Insurance Company's concurrently-filed Reply in Support of its Motion to Dismiss Plaintiff Crowley Maritime Corporation's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Twin City Fire Insurance Company hereby requests that the Court take judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, of the following:[1]

(1) Order by the Superior Court of the State of California, County of San Francisco, in the case entitled nVidia Corp. v. St. Paul Mercury Ins. Co., County of San Francisco Superior Court Case No. Civ. 05-438278. A true and correct copy of the Order is attached hereto as Exhibit A.

(2) Defendant Executive Risk Indemnity Inc.'s Notice of Demurrer and Demurrer to Plaintiff's First Amended Complaint; Memorandum of Points and Authorities in Support Thereof in the case entitled nVidia Corp. v. St. Paul Mercury Ins. Co., County of San Francisco Superior Court Case No. Civ. 05-438278. A true and correct copy of the Notice and Memorandum is attached hereto as Exhibit B.

(3) Defendant Federal Insurance Company's Answer to Plaintiff Crowley Maritime Corporation's Complaint in the case entitled Crowley Maritime Corp. v. Federal Ins. Co., United States District Court for the Northern District of California, San Francisco Division Case No. CV-08-00830 SI. A true and correct copy of the Answer is attached hereto as Exhibit C.

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[1] This Court may take judicial notice of documents filed and orders or decisions entered in federal or state court. *See, e.g., Doran v. Eckold*, 409 F.3d 958, 962, fn. 1 (8th Cir. 2005) (judicially noticing documents considered by District Court at summary judgment stage but not admitted at trial); *Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002) (judicially noticing California Court of Appeal's opinion, the briefs filed in that proceeding, and the briefs filed in the trial court).

(4) Letter dated March 28, 2007 from Phillip L. Pilsbury, Jr. and Richard D. Shively to Chubb Group of Insurance Companies, Hartford/Twin City, and RLI Insurance Company. A true and correct copy of the Letter is attached hereto as Exhibit D.

Dated: March 21, 2008

Respectfully Submitted,

STROOCK & STROOCK & LAVAN LLP
MICHAEL F. PERLIS
RICHARD R. JOHNSON
RACHAEL SHOOK

By: /s/ Richard R. Johnson
Richard R. Johnson

Attorneys for Defendant
TWIN CITY FIRE INSURANCE COMPANY

EXHIBIT A

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Attorneys for Defendant
EXECUTIVE RISK INDEMNITY INC.

ENDORSED
FILED
San Francisco County Superior Court

AUG 22 2005

GORDON PARK-LI, Clerk
BY: RENE A. PASCUAL
Deputy Clerk

ORIGINAL

FAXED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

NVIDIA CORPORATION, a Delaware corporation; NVIDIA US INVESTMENT COMPANY, f/k/a TITAN ACQUISITION CORP. NO. 2, a Delaware corporation; TENCH COXE, an individual; JAMES C. GAITHER, an individual; CHRISTINE B. HOBERG, an individual; JEN-HSUN HUANG, an individual; HARVEY C. JONES, an individual; WILLIAM J. MILLER, an individual; STEPHEN H. PETTIGREW, an individual; BROOKE SEAWELL, an individual; and MARK A. STEVENS, an individual,

Plaintiffs,

vs.

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation; EXECUTIVE RISK INDEMNITY INCORPORATED, a Delaware corporation; and ROYAL INSURANCE COMPANY OF AMERICA, an Illinois corporation,

Defendants.

Case No. 05-438278

[PROPOSED] ORDER SUSTAINING IN PART AND OVERRULING IN PART DEMURRER OF DEFENDANT EXECUTIVE RISK INDEMNITY INC. TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Action Filed: January 31, 2005
Date: June 28, 2005
Time: 9:30 a.m.
Dept: 302

EXHIBIT A PAGE 4

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

On June 28, 2005, the Demurrer of Defendant Executive Risk Indemnity Inc. ("ERII") to Plaintiffs' First Amended Complaint came on regularly for determination by this Court. Michael F. Perlis and Cary J. Brunner, both of Stroock & Stroock & Lavan LLP, appeared on behalf of ERII. Martin H. Myers and Nathan E. Shafroth, both of Heller Ehrman LLP, appeared on behalf of Plaintiffs. Anntim J. Vulchev of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, appeared on behalf of Defendant Royal Indemnity Company.

After consideration of the submitted briefs, oral argument by the parties and all other matters presented to the Court:

IT IS HEREBY ORDERED that ERII's Demurrer is SUSTAINED without leave to amend as to the Second Cause of Action for Breach of Contract for the Underlying Action and ERII's Demurrer is OVERRULED as to the Fourth and Fifth Causes of Action for Declaratory Relief Regarding Defendants' Duty to Pay "Loss" in Connection with the Underlying Actions and Regarding Defendants' Obligation to Pay Defense Fees and Costs and Indemnification for the Underlying Actions, respectively. ERII shall file and serve an answer or other response to Plaintiffs' First Amended Complaint within ten (10) days of the date of this Order.

Dated: 8/19/05

The Honorable Ronald E. Quidachay
San Francisco County Superior Court Judge

Submitted By:

Dated: July 28, 2005

STROOCK & STROOCK & LAVAN LLP
MICHAEL F. PERLIS
JAMES W. DENISON
CARY JOY BRUNNER

By: Cary Joy Brunner
Cary Joy Brunner
Attorneys for Defendant
EXECUTIVE RISK INDEMNITY INC.

STROOCK & STROOCK & LAVAN LLP
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Los Angeles, California 90067-3086

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Suite 1800, Los Angeles, California 90067-3086.

On July 28, 2005, I served the foregoing document(s) described as: ***[PROPOSED] ORDER SUSTAINING IN PART AND OVERRULING IN PART DEMURRER OF DEFENDANT EXECUTIVE RISK INDEMNITY INC. TO PLAINTIFFS' FIRST AMENDED COMPLAINT*** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED MAILING LIST

☐ **(VIA PERSONAL SERVICE)** By causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth above.

x **(VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.

☐ **(VIA FACSIMILE)** By causing such document to be delivered to the office of the addressee via facsimile.

☐ **(VIA OVERNIGHT DELIVERY)** By causing such envelope to be delivered to the office of the addressee(s) at the address(es) set forth above by overnight delivery via Federal Express or by a similar overnight delivery service.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 28, 2005, at Los Angeles, California

Patricia A. Bloom
[Type or Print Name]

Patricia A. Bloom
[Signature]

MAILING LIST

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EXHIBIT B

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Attorneys for Defendant
EXECUTIVE RISK INDEMNITY INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

NVIDIA CORPORATION, a Delaware corporation; NVIDIA US INVESTMENT COMPANY, f/k/a TITAN ACQUISITION CORP. NO. 2, a Delaware corporation; TENCH COXE, an individual; JAMES C. GAITHER, an individual; CHRISTINE B. HOBERG, an individual; JEN-HSUN HUANG, an individual; HARVEY C. JONES, an individual; WILLIAM J. MILLER, an individual; STEPHEN H. PETTIGREW, an individual; BROOKE SEAWELL, an individual; and MARK A. STEVENS, an individual,

Plaintiffs,

vs.

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation; EXECUTIVE RISK INDEMNITY INCORPORATED, a Delaware corporation; and ROYAL INSURANCE COMPANY OF AMERICA, an Illinois corporation,

Defendants.

Case No. 05-438278

DEFENDANT EXECUTIVE RISK INDEMNITY INC.'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Action Filed: January 31, 2005
Date: June 28, 2005
Time: 9:30 a.m.
Dept: 302

TO: PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 28, 2005, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Department 302 of the San Francisco Superior Court, located at 400 McAllister Street, San Francisco, CA 94102-4514, Defendant Executive Risk Indemnity Inc. ("ERII") will, and hereby does move this Court, pursuant to California Code of Civil Procedure §§ 430.10 and 430.30, for an Order sustaining this Demurrer to Plaintiffs' First Amended Complaint, and specifically to the causes of action for Breach of Contract and Declaratory Relief asserted against ERII. ERII's Demurrer is based on this Notice of Demurrer, the attached Demurrer, the attached Memorandum of Points and Authorities in Support Thereof, and on such other files, pleadings and oral argument as may be presented at the time of hearing on this matter.

Dated: May 24, 2005

STROOCK & STROOCK & LAVAN LLP
MICHAEL F. PERLIS
JAMES W. DENISON
CARY JOY BRUNNER

By: Michael F. Perlis
Michael F. Perlis

Attorneys for Defendant
EXECUTIVE RISK INDEMNITY INC.

EXHIBIT B PAGE 9

DEMURRER

Defendant Executive Risk Indemnity Inc. ("ERII") hereby demurs to the First Amended Complaint filed by Plaintiffs herein on the following grounds:

Demurrer to Second Cause of Action

1. The Second Cause of Action fails to state facts sufficient to constitute a cause of action. See Cal. Civ. Proc. Code § 430.10(e).

Demurrer to Fourth Cause of Action

2. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action. See Cal. Civ. Proc. Code § 430.10(e).

Demurrer to Fifth Cause of Action

3. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of action. See Cal. Civ. Proc. Code § 430.10(e).

Dated: May 24, 2005

STROOCK & STROOCK & LAVAN LLP
MICHAEL F. PERLIS
JAMES W. DENISON
CARY JOY BRUNNER

By: Michael F. Perlis
Michael F. Perlis

Attorneys for Defendant
EXECUTIVE RISK INDEMNITY INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its previous demurrer, Executive Risk Indemnity Inc. ("ERII") pointed out that, until underlying insurers exhaust their policy limits, there is generally no duty or obligation on the part of an excess insurer in ERII's position. Only $1,8455,000 of the $5,000,000 underlying layer of insurance was alleged to have been exhausted, and so ERII's demurrer to the original complaint of nVidia Corporation ("nVidia") was sustained.

With its First Amended Complaint, nVidia attempts to fix its original, deficient pleading by, among other things, simply omitting all reference to the underlying insurer's having paid only $1,845,000. That is no way to remedy a factually deficient claim, as numerous California courts have held. If the facts admitted previously defeat a claim, a plaintiff must provide an explanation of how additional facts cure the defect. nVidia did not even attempt to do so. Instead, nVidia merely includes the conclusory legal argument that the "liability limit of the St. Paul Policy has been fully exhausted," without any explanation of how that could have occurred without simply contradicting the previous factual allegations. Under the terms of the Policy at issue, there has in fact been no exhaustion of the underlying insurance. As such, the claim for breach of contract against ERII fails, and the Demurrer should be sustained.

Under the circumstances, as before, ERII also should not be compelled to participate in a declaratory relief action concerning duties or obligations that only may arise in the future if, hypothetically, coverage is found and the underlying policy limits are exhausted. To pursue a declaratory relief claim, a party must demonstrate that there is an actual and present controversy for the court to resolve. nVidia has once again failed to allege more than a request for an advisory opinion.

Accordingly, and as discussed further below, ERII respectfully urges the Court to sustain its Demurrer to the claims for (1) breach of contract, (2) declaratory relief regarding defendants' duty to pay "loss," and (3) declaratory relief regarding defendants' obligation to pay defense fees and costs and indemnification.

II. BACKGROUND

This insurance dispute, involving several layers of primary and excess insurance, arose in connection with certain claims asserted against the Plaintiffs in three adversary proceedings in the Chapter 11 bankruptcy of 3dfx Interactive, Inc. ("3dfx"), in the United States Bankruptcy Court, Northern District of California (the "Underlying Actions"). (Apr. 19, 2005, First Amended Complaint ¶ 1.) The crux of the allegations in the Underlying Actions is that nVidia Corporation's ("nVidia") purchase of the assets of 3dfx left 3dfx with insufficient assets to continue in business and, as such, was a fraud upon creditors of 3dfx, interfered with 3dfx's contracts, or effected a de facto merger of 3dfx with nVidia. (See id. ¶ 33.)

Plaintiffs tendered the claims arising out of the adversary proceedings to their primary insurer, Gulf Insurance Company ("Gulf"), which issued a Directors and Officers Liability and Company Indemnification Policy ("Gulf Policy") to nVidia. The Gulf Policy had a limit of $5 million, which has been fully exhausted according to the Plaintiffs. (Id. ¶¶ 19-20, 35.) A number of excess carriers also issued policies that apply in conformance with the Gulf Policy, except as specifically set forth in the terms, conditions and/or endorsements of the excess policies. Immediately above the Gulf Policy is a policy from North American Capacity Insurance Company ("North American"), whose $5 million limits are also alleged to have been exhausted. (Id. at ¶¶ 21-22, 35.)

The three defendant insurers in this litigation are the excess carriers that issued the policies with layers of coverage above Gulf and North American. St. Paul Mercury Insurance Company ("St. Paul") issued an excess policy (the "St. Paul Policy") with a $5 million limit in excess of the $10 million available under the Gulf and North American policies. However, St. Paul has paid the Plaintiffs only $1,845,000.00 of its $5 million limits and seeks reimbursement of that amount, based on its view that coverage is unavailable.[1] (See Jan. 31, 2005, Complaint ¶ 38.) ERII issued its Excess Indemnity Policy No. 8167-9053 (the "ERII Policy") to nVidia, which applies in

[1] At the hearing on ERII's previous demurrer, this Court admonished nVidia that it replead claims against the excess carriers only if it could plead exhaustion in good faith. nVidia appears to have disregarded the Court's admonition, as addressed further below.

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conformance with the St. Paul Policy, except as specifically set forth in the terms, conditions and/or endorsements of the ERII Policy. (Apr. 19, 2005, First Amended Complaint ¶ 25 & Ex. D § 1.) The ERII Policy has Limits of Liability of $5 million (inclusive of Defense Expenses) in excess of the $15 million of underlying insurance. (Id.) Last, Royal Insurance Company of America also issued an excess policy to Plaintiffs with a limit of liability of $5 million in excess of $20 million. (Id. ¶ 26.)

Of significance for the purposes of this Demurrer are the following provisions of the ERII Policy. First, the "Insuring Agreement" in Section I of the Policy provides:

> [ERII] shall provide the Insured with insurance excess of the Underlying Insurance stated in ITEM 4 of the Declarations .... Except as specifically set forth in the terms, conditions or endorsements of this policy, coverage hereunder shall apply in conformance with the terms, conditions and endorsements of the policy immediately underlying this policy, except that coverage hereunder shall attach only after all Underlying Insurance has been exhausted by actual payment of claims or losses thereunder.

(Complaint Ex. D at 1 § I (emphasis added).) Second, the "Depletion of Underlying Limits" provision of the Policy states:

> In the event of depletion of the limits of liability of the Underlying Insurance solely as the result of actual payment of claims or losses thereunder by the applicable insurers, this policy shall, subject to the Company's limits of liability and to the other terms, conditions and endorsements of this policy, continue to apply to claims or losses as excess insurance over the amount of insurance remaining under such Underlying Insurance.[2]

(Id. at 2 § IV (emphasis added).)

On January 31, 2005, Plaintiffs filed a complaint in this Court against ERII and two other excess insurers alleging causes of action for breach of contract and declaratory relief, along with a

[2] Thus, if underlying insurance is depleted to zero, ERII's obligation to pay excess is triggered, subject to the terms and conditions of the Policy. Additional language in the "Depletion of Underlying Limits" clause provides that, in the event that underlying insurance is exhausted and "subsequent claims" are brought against the insureds, ERII responds as though it were the primary insurer. Specifically, that portion of Section IV provides:

> In the event of the exhaustion of all of the limits of liability of such Underlying Insurance solely as the result of actual payment of claims or losses thereunder, the remaining limits available under this policy shall, subject to the Company's limits of liability and to the other terms, conditions and endorsements of this policy, continue for subsequent claims or losses as primary insurance. Under such circumstances, any retention or deductible specificed in the Primary Policy shall also apply to this policy.

(Id. at 2 § IV.) nVidia has not contended that it ever submitted "subsequent claims or losses" to which this portion of Section IV might apply.

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claim for breach of the implied covenant of good faith and fair dealing against St. Paul. On April 4, 2005, this Court sustained the Demurrer of ERII to the original complaint, with leave to amend. On April 19, 2005, nVidia filed the First Amended Complaint that is the subject of the present Demurrer.

In the new pleading, nVidia removed the allegation that St. Paul paid $1,845,000, along with certain details about nVidia's and St. Paul's negotiations of an interim resolution to their coverage dispute. (Compare Jan. 31, 2005, Complaint ¶ 38 and Apr. 19, 2005, First Amended Complaint ¶ 40.) Added to the new pleading was the following allegation:

> The liability limit of the St. Paul Policy has been fully exhausted by actual payment of covered claims or losses thereunder, arising from actions and proceedings against nVidia Insureds in connection with the Underlying Actions.[3]

(Apr. 19, 2005, First Amended Complaint ¶ 24.) Also added was the following:

> The nVidia Insureds have incurred defense fees and costs for the Underlying Actions in excess of $6.5 million through the close of fact discovery, for which coverage is provided under Defendants' Policies.

(Id. ¶ 44.)

III. ARGUMENT

A. Standard of Law

After a demurrer is sustained, a plaintiff wishing to replead is no longer working on a clean slate. As was explained in Pierce v. Lyman, 1 Cal. App. 4th 1093 (1991):

> "[Appellants] may not so easily avoid the effect of the allegations of their earlier complaint. 'Where a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation.' [T]he rule also applies to unverified complaints." ...
>
> "A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective."

Id. at 1109 (citations omitted); see also Owens v. Kings Supermarket, 198 Cal.App.3d 379, 384 (1988).

Additionally, regardless of whether the pleading is an original or amended one,

[3] In so pleading, nVidia does not quote the actual language of the Policy, which refers to exhaustion of "Underlying Insurance" and payment "by the applicable insurers."

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"contentions, deductions or conclusions of fact or law alleged in the complaint are not considered in judging its sufficiency." Id.; see also 20th Century Ins. Co. v. Quackenbush, 64 Cal. App. 4th 135, 138 n. 1 (1998) ("Argumentative allegations, and conclusions of law, are not . . . presumed true"). Moreover, allegations about the contents of documents referenced in the pleading and their legal effect may be disregarded as surplusage. See Barnett v. Fireman's Fund Ins. Co., 90 Cal. App. 4th 500, 505, 108 Cal. Rptr. 2d 657, 659 (2001) ("[W]e rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits"); Frantz v. Blackwell, 189 Cal. App. 3d 91, 94, 234 Cal. Rptr. 178, 179-180 (1987).

As addressed below, although nVidia has attempted to plead around the deficiencies that prompted this Court to sustain ERII's demurrer previously, it has done so in precisely the manner Pierce v. Lyman prohibits. The facts remain the same, and they simply do not support any claims for relief. Accordingly, this Demurrer should be sustained in its entirety.

B. nVidia Cannot Simply Omit Previously Pled Facts to Salvage Its Contract Claim

As ERII argued in support of its previous Demurrer, although the risks an excess insurer undertakes may be defined in various ways, in general an excess policy will not be triggered until the underlying insurance is exhausted. See, e.g., Ticor Title Ins. Co. v. Employers Ins. of Wausau, 40 Cal. App. 4th 1699, 1707 (1995); Wells Fargo Bank v. California Ins. Guar. Ass'n, 38 Cal. App. 4th 936, 945-46 (1995).

In Wells Fargo, a primary insurer paid most of its policy limits to settle a lawsuit against the insured, and the excess insurers did not contribute. In fact, the second-level excess carrier was insolvent by the time Wells Fargo brought the action. Wells Fargo argued that, in light of the second-level insurer's insolvency, the third-level excess carriers were required to "drop down" to cover the settlement. The California Court of Appeal disagreed. The excess policies provided that "[i]n the event of reduction or exhaustion of the aggregate limits designated in the underlying policy or policies solely by payment of losses ... such insurance as is afforded by this policy shall apply in excess of the reduced underlying limit or, if such limit is exhausted, shall apply as underlying insurance ...." 38 Cal. App. 4th at 941 (emphasis in original). As the Wells Fargo

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Court noted, similar exhaustion clauses with the language "solely by reason of losses paid thereunder" had been interpreted as "unambiguous ... in that [the excess policy] insures against the reduction of the underlying policies only by reason of out-of-pocket payments for losses by lower level insurers." Id. at 945 (citing cases). Accordingly, the excess insurers' obligations were not triggered by the lower level insurer's insolvency in Wells Fargo, since no payment by the second-level insurer had been made. See id. at 946.

Similarly, in Ticor, the plaintiff tendered defense of the underlying litigation to its primary insurer, which denied coverage. The issue then became whether the excess insurer might have a duty to defend "when the primary insurer refuses and the amount of the claim approaches or exceeds the primary limits." Id. at 1708. As the Ticor Court wrote, "We see no reason not to treat refusal to defend cases like insolvency 'drop down cases.'" 40 Cal. App. 4th at 1708. Accordingly, the Ticor Court held that "if there was a duty to defend at all, that duty was [the primary insurer's] until its limits of liability were spent. ... [B]ecause [the primary insurer] never came forward, [the excess insurer's] obligation was never triggered." Id. at 1709.

In the case at hand, the Policy makes clear that ERII's obligations are triggered "only after all Underlying Insurance has been exhausted by actual payment of claims or losses thereunder." (See Jan. 31, 2005, Complaint Ex. D at 1 § I ("Insuring Agreement"); see also id. at 2 § IV ("Depletion of Underlying Limits").) It further clarifies that depletion of the Underlying Insurance for a given claim must be "solely as the result of actual payment of claims or losses thereunder by the applicable insurers" in order for ERII's coverage to apply. (See id. at 2 § IV.)

In the original Complaint, nVidia alleged that there was a partial depletion of the limits of underlying insurer St. Paul's policy. Specifically, St. Paul was alleged to have paid $1,845,000 toward defense costs, which left $3,155,000 remaining before the underlying $5,000,000 limits would be exhausted. (See Jan. 31, 2005, Complaint at 10 ¶ 38.) It was further alleged that St. Paul and nVidia had been negotiating possible reimbursement of 50 percent of defense costs by St. Paul, but then St. Paul determined to deny coverage and seek return of the $1,845,000. (See id.) Thus, there was no exhaustion of the Underlying Insurance triggering an obligation on ERII's part.

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In the First Amended Complaint, nVidia does not address the prior allegations that showed lack of exhaustion. Instead, nVidia (i) omits the allegation about St. Paul paying the $1,845,000 entirely and (ii) alleges that St. Paul was to reimburse "only part" of defense costs, without specifying that the proportion it proposed was 50 percent of defense costs. (See Apr. 19, 2005, First Amended Complaint ¶ 40.)

nVidia cannot hope to create a claim in this manner through selective allegations from one pleading to the next. The fact that St. Paul only paid $1,845,000 remains, regardless of whether nVidia omits it this time. Indeed, from the allegations of the two pleadings taken together, it may be that nVidia would not have even exceeded St. Paul's policy limits by this time had St. Paul accepted the proposal that it pay 50 percent of defense costs.[4] Under Pierce v. Lyman, nVidia's attempts to plead around its prior admissions fail. See 1 Cal. App. at 1109.

Nor is the claim revived by the legal conclusion nVidia includes in the new pleading that purportedly "[t]he liability limit of the St. Paul Policy has been fully exhausted by actual payment of covered claims or losses thereunder ...." (See First Amended Complaint ¶ 24.) The only payment St. Paul made was for $1,845,000, as nVidia previously alleged. If nVidia wanted to contend that exhaustion of Underlying Insurance could somehow occur without St. Paul making payments, it was incumbent upon it to explain how that could be. Omitting allegations from the prior pleading that tend to conflict with the assertion is no way to establish its validity.

Beyond the foregoing, the contention that the "liability limit of the St. Paul policy has been fully exhausted" is legal argument that this Court can reject in ruling on a demurrer. 20th Century Ins. Co. v. Quackenbush, 64 Cal. App. 4th at 138 n. 1. The Policy requires that "all Underlying

[4] nVidia alleges it "incurred defense fees and costs for the Underlying Actions in excess of $6.5 million ...." (Id. ¶ 44.) The 50 percent "part" of $6.5 million in defense costs nVidia claims it incurred would only total $3.25 million, still shy of the $5 million limits.

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Insurance has been exhausted," which simply has not occurred.[5] The Demurrer to the breach of contract claim against ERII should be sustained.

C. **A Claim For Declaratory Relief Requires a Showing of Actual, Present Controversy**

An action for declaratory relief requires a showing of not only an actual controversy between the parties but a present one. See City of Cotati v. Cashman, 29 Cal. 4th 69, 80 (2002). As ERII argued previously, here, any number of events may occur in the near future that could establish a complete lack of coverage or, at the least, that the St. Paul layer of coverage will never be exhausted. A present controversy is therefore lacking; nVidia seeks an advisory opinion about hypothetical issues.[6]

As ERII also pointed out previously, a declaratory relief action may be inadvisable because some of ERII's defenses to coverage would also require proving the case against nVidia, which would not be in nVidia's interest. See Raychem Corp. v. Federal Ins. Co., 853 F. Supp. 1170, 1185 (N.D. Cal. 1994) (recognizing that an insurer may choose not to file a declaratory relief action and seek evidence of misconduct by its insureds due to the prejudice it could cause the insureds' defense). As was explained in Haskel v. Superior Court, 33 Cal. App. 4th 963 (1995):

> There are three concerns which the courts have about the trial of coverage issues which necessarily turn upon the facts to be litigated in the underlying action. First, the insurer, who is supposed to be on the side of the insured and with whom there is a special

[5] It may be that nVidia is assuming that language should be imported into the Policy from the policy that was at issue in Span, Inc. v. Associated Internat. Ins. Co., 227 Cal. App.3d 463 (1991). In Span, the excess carrier's obligation could be triggered by exhaustion of the "aggregate limits of liability applicable to the underlying insurance." See id. at 476 (emphasis added). This different phrasing about exhaustion of "limits ... applicable to" was interpreted, in the context of the entire policy at issue in Span, as meaning that coverage would be triggered if either the underlying insurer or the insured paid. That was also what the policy in Span specifically provided, though. In particular, the Span policy provided: "Liability under this policy with respect to any occurrence shall not attach unless and until the insured, or the insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence." See id. n.7 (emphasis added). The Policy in the case at hand, by contrast, says just the opposite: Depletion of the Underlying Insurance must be "solely as the result of actual payment of claims or losses thereunder by the applicable insurers." (Complaint Ex. D § IV.)

[6] Indeed, while nVidia's allegations are unclear as to how much in covered defense costs it now contends have been incurred – it may be $6.5 million or even $8.3 million, depending on how the $1.8 million St. Paul paid fits in – it is likely that nVidia will soon contend that defense expenses have eaten up all of ERII's layer of coverage. In that case it will no longer conceivably have a claim for indemnity against ERII. The Fifth Claim for Relief, requesting a ruling on indemnification, is therefore hypothetical in the extreme.

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relationship, effectively attacks its insured and thus gives aid and comfort to the claimant in the underlying suit; second, such a circumstance requires the insured to fight a two front war, litigating not only with the underlying claimant, but also expending precious resources fighting an insurer over coverage questions – this effectively undercuts one of the primary reasons for purchasing liability insurance; and third, there is a real risk that, if the declaratory relief action proceeds to judgment before the underlying action is resolved, the insured could be collaterally estopped to contest issues in the latter by the results of the former.

Id.

Declaratory relief is therefore not appropriate under the circumstances. See Cal. Civ. Proc. Code § 1061; see also Green v. Travelers Indemnity Co., 185 Cal. App. 3d 544, 230 Cal. Rptr. 13 (1986); State Farm Mut. Auto. Ins. Co. v. Super. Ct., 47 Cal. 2d 428, 432-33, 304 P.2d 13 (1956). The demurrer to the Plaintiffs' Fourth and Fifth Causes of Action should therefore be sustained.

IV. CONCLUSION

For the foregoing reasons, and for the reasons ERII raised previously in its demurrer to the original complaint, ERII respectfully requests that the Court enter an order sustaining the instant Demurrer to Plaintiffs' First Amended Complaint in its entirety withouth leave to amend.

Dated: May 24, 2005

STROOCK & STROOCK & LAVAN LLP
MICHAEL F. PERLIS
JAMES W. DENISON
CARY JOY BRUNNER

By: Michael F. Perlis (jmo)
Michael F. Perlis

Attorneys for Defendant
EXECUTIVE RISK INDEMNITY INC.

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2029 Century Park East, Suite 1800
Los Angeles, California 90067-3086

EXHIBIT B PAGE 21

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Suite 1800, Los Angeles, California 90067-3086.

On May 24, 2005, I served the foregoing document(s) described as: **DEFENDANT EXECUTIVE RISK INDEMNITY INC.'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

MARTIN H. MYERS
HELLER EHRMAN WHITE & MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104-2878

☐ **(VIA PERSONAL SERVICE)** By causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth above.

☒ **(VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.

☐ **(VIA FACSIMILE)** By causing such document to be delivered to the office of the addressee via facsimile.

☐ **(VIA OVERNIGHT DELIVERY)** By causing such envelope to be delivered to the office of the addressee(s) at the address(es) set forth above by overnight delivery via Federal Express or by a similar overnight delivery service.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 24, 2005, at Los Angeles, California.

Dianne Mueller
[Type or Print Name]

Dianne Mueller
[Signature]

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Los Angeles, California 90067-3086

EXHIBIT B PAGE 22

EXHIBIT C

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Attorneys for Defendant
FEDERAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

CROWLEY MARITIME CORPORATION,

Plaintiff,

vs.

FEDERAL INSURANCE COMPANY,; TWIN CITY FIRE INSURANCE COMPANY; RLI INSURANCE COMPANY; and DOES 1-20, inclusive,

Defendants.
_____/

No. CV 08 0830 SI

ANSWER OF FEDERAL INSURANCE COMPANY

Complaint Filed: 01/07/08
Trial Date: None Set

ANSWER OF FEDERAL INSURANCE COMPANY

Defendant Federal Insurance Company ("Federal"), for its Answer to the Complaint of Plaintiff Crowley Maritime Corporation ("CMC"), states as follows:

1. Federal denies the allegations in Paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth of those allegations.

2. Federal admits the allegations in Paragraph 2 with respect to Federal, and admits on information and belief the allegations in Paragraph 2 with respect to Twin City Fire Insurance Company ("Twin City") and RLI Insurance Company ("RLI").

3. Federal denies the allegations in Paragraph 3 for lack of knowledge or information sufficient to form a belief as to the truth of those allegations.

4. Federal denies the allegations in Paragraph 4.

5. Federal admits that it issued Executive Protection Portfolio Policy No. 8120-0792 (the "Federal Policy") to CMC for the November 1, 2004 to November 1, 2005 Policy Period; that the Federal Policy includes an Executive Liability and Entity Securities Liability Coverage Section (the "EL Section"); and that the EL Section is subject to a $10 million per Claim and aggregate Limit of Liability and a $500,000 retention with respect to Insuring Clauses 2 and 3. Federal denies any other allegations as to the content of the Federal Policy and states that the Federal Policy speaks for itself. Federal denies that Exhibit A to CMC's Complaint is a true and correct copy of the Federal Policy. Federal denies the allegation in the first half of the last sentence of Paragraph 5 as to where the Federal Policy was issued. The second half of the last sentence of Paragraph 5 sets forth conclusions of law to which no response is required.

6. Insofar as the allegations of Paragraph 6 are not directed to Federal, no response is required. To the extent any response is required, Federal denies the allegations in Paragraph 6 for lack of knowledge or information sufficient to form a belief as to the truth of those allegations.

7. Insofar as the allegations of Paragraph 7 are not directed to Federal, no response is required. To the extent any response is required, Federal denies the

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allegations in Paragraph 7 for lack of knowledge or information sufficient to form a belief as to the truth of those allegations.

8. Federal admits that a putative derivative and class action captioned Franklin Balance Sheet Investment Fund, et al. v. Crowley, et al., C.A. No. 888-VCP (the "Franklin Fund Action") was filed against CMC and certain individuals alleged to be directors of CMC on November 30, 2004 in the Delaware Court of Chancery. Federal denies the characterization of the Franklin Fund Action in Paragraph 8 and states that the pleadings in that action speak for themselves. Federal denies the allegations in the last two sentences of Paragraph 8.

9. Paragraph 9 should be stricken because it is not limited to a single set of circumstances and therefore violates Rule 10(b) of the Federal Rules of Civil Procedure. To the extent any response is required, Federal denies the allegations in Paragraph 9, except that Federal admits: (a) as to the first and second sentences, that CMC's counsel sent Federal a letter dated March 28, 2007, which speaks for itself; (b) as to the third and fourth sentences, that CMC's counsel and Federal's claims examiner Henry Nicholls spoke by telephone on April 5, 2007; and (c) as to the seventh and eighth sentences, that the Delaware Chancery Court approved the settlement in a decision that speaks for itself. Federal states that, contrary to the allegations in Paragraph 9, CMC negotiated, drafted and executed the referenced settlement without prior notice to or consent by Federal. By negotiating and entering into the Agreement without Federal's knowledge or consent, CMC violated its obligation under the Federal Policy "not to settle or offer to settle any Claim . . . or otherwise assume any contractual obligation . . . without [Federal's] prior written consent."

10. Paragraph 10 should be stricken because it is not limited to a single set of circumstances and therefore violates Rule 10(b) of the Federal Rules of Civil Procedure. To the extent any response is required, Federal denies the allegations in

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Paragraph 10, except that: (a) as to the fifth sentence, Federal admits that the Delaware Chancery court awarded the plaintiffs a total of $4,219,458.26 in attorneys' fees and expenses, but Federal lacks knowledge or information sufficient to form a belief as to whether CMC paid that amount; and (b) as to the sixth sentence, Federal denies the allegations on the ground that the Chancery Court's decision speaks for itself.

11. Paragraph 11 sets forth conclusions of law to which no response is required. To the extent a response is required, Federal denies the allegations in Paragraph 11.

12. Federal denies the allegations of Paragraph 12 and further states that the referenced June 14, 2007 letter speaks for itself.

13. Federal denies the allegations in Paragraph 13.

14. Federal denies the allegations in Paragraph 14.

15. Paragraph 15 sets forth conclusions of law to which no response is required. To the extent a response is required, Federal denies the allegations in Paragraph 15.

16. Federal denies the allegations in Paragraph 16.

17. Federal denies the allegations in Paragraph 17.

18. Federal incorporates by reference herein its responses to the allegations in paragraphs 1-17.

19. Federal admits that Federal issued the Federal Policy for the November 1, 2004 to November 1, 2005 Policy Period and otherwise denies the allegations in Paragraph 19 as to the Federal Policy. Federal denies the remaining allegations in Paragraph 19 for lack of knowledge or information sufficient to form a belief as to the truth of those allegations.

20. Federal denies the allegations in Paragraph 20.

21. Federal denies the allegations in Paragraph 21.

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22. Federal denies the allegations in Paragraph 22.

23. Federal denies the allegations in Paragraph 23.

24. Federal denies the allegations in Paragraph 24. Federal states that CMC breached its obligations under the Federal Policy and failed to satisfy all applicable conditions precedent by actions or inactions including but not limited to: (a) negotiating and executing the Franklin Fund Action settlement agreement without consulting with Federal in advance and without Federal's prior written consent, in breach of Clauses 16(b) and (c) of the Federal Policy's EL Section; (b) failing to defend the Franklin Fund Action, in breach of Clause 16(a) of the Federal Policy's EL Section; (c) prejudicing Federal's position, in breach of Clause 16(d) of the Federal Policy's EL Section; and (d) filing suit against Federal without first complying with the terms of the Federal Policy, in breach of Clause 8 of the Federal Policy's General Terms and Conditions Section.

25. Federal denies the allegations in Paragraph 25.

26. Federal denies the allegations in Paragraph 26.

27. Federal denies the allegations in Paragraph 27.

28. Federal incorporates by reference herein its responses to the allegations in paragraphs 1-27.

29. Paragraph 29 sets forth conclusions of law to which no response is required. To the extent a response is required, Federal denies the allegations in Paragraph 29.

30. Federal denies the allegations in Paragraph 30, including subparagraphs (a) through (e).

31. Federal denies the allegations in Paragraph 31.

32. Federal denies the allegations in Paragraph 32.

33. Federal denies the allegations in Paragraph 33.

34. Federal denies the allegations in Paragraph 34.

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35. Federal denies the allegations in Paragraph 35.

36. Federal denies that CMC is entitled to any of the relief requested in the Complaint.

37. Any and all allegations not expressly admitted, denied, qualified or otherwise responded to are hereby denied.

DEFENSES

First Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Defense

The Complaint is barred because CMC settled, offered to settle, assumed a contractual obligation or admitted liability with respect to the Franklin Fund Action without Federal's prior written consent and without any prior notice to Federal, in violation of Clause 16(b) of the Federal Policy's EL Section

Third Defense

The Complaint is barred because CMC deprived Federal of the right to effectively associate with the Insureds, and CMC failed to consult in advance with Federal, regarding the defense and settlement of the Franklin Fund Action, including the negotiation of the settlement of that action, in violation of Clause 16(c) of the Federal Policy's EL Section.

Fourth Defense

The Complaint is barred because CMC failed to provide Federal with all information, assistance and cooperation which Federal reasonably required and because CMC prejudiced Federal's position, in violation of Clause 16(d) of the Federal Policy's EL Section.

Fifth Defense

The Complaint is barred insofar as CMC seeks to recover amounts that do not constitute Loss under the applicable law or the definition set forth in Clause 5 of the

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Federal Policy's EL Section, or that are uninsurable under the applicable law or as a matter of public policy.

Sixth Defense

The Complaint is barred insofar as CMC seeks to recover amounts that neither it nor any Insured Person was "legally obligated to pay on account of any Claim."

Seventh Defense

The Complaint is barred by California Insurance code Section 533, because any loss for which CMC seeks coverage was caused by the willful act of the insured.

Eighth Defense

The Complaint is barred insofar as CMC breached its duty to defend the Franklin Fund Action in violation of Clause 16(a) of the Federal Policy's EL Section.

Ninth Defense

The Complaint is barred because Exclusion 7(c) of the Federal Policy's EL Section precludes coverage insofar as the Franklin Fund Action is based upon, arises from, or is in consequence of one or more of the director defendants having gained in fact any profit, remuneration or advantage to which such director defendants were not legally entitled.

Tenth Defense

The Complaint is barred to the extent that the Franklin Fund Action is or is deemed to be a Claim first made prior to the Federal Policy's Policy Period, pursuant to Clauses 5 or 13(g) of the Federal Policy's EL Section.

Eleventh Defense

The Complaint is barred insofar as CMC failed to give notice in accordance with Clause 15 of the Federal Policy's EL Section.

Twelfth Defense

The Complaint is barred to the extent that CMC is seeking coverage for amounts for which CMC purported to grant indemnification to an Insured Person

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when CMC was neither permitted nor required by law to grant any such indemnification.

Thirteenth Defense

The Complaint is barred to the extent that CMC is seeking coverage for any amounts allocated to non-covered loss pursuant to Clause 17 of the Federal Policy's EL Section.

Fourteenth Defense

The Complaint is barred insofar as CMC is seeking coverage for amounts that do not exceed the applicable retention under the Federal Policy's EL Section.

Fifteenth Defense

The Complaint is barred by laches, waiver and estoppel, including judicial estoppel.

Sixteenth Defense

The Complaint is barred by CMC's failure to satisfy one or more conditions precedent to coverage or to filing suit against Federal.

Seventeenth Defense

The Complaint is barred in whole or in part by all terms, conditions, definitions, exclusions, limits of liability and deductible amounts set forth in the Federal Policy.

Eighteenth Defense

Any prayer for damages is barred by CMC's failure to take reasonable efforts to mitigate any alleged damages.

Nineteenth Defense

Any prayer for equitable relief is barred in whole or in part by the doctrine of unclean hands.

Twentieth Defense

The Complaint is barred because Federal acted reasonably and in a timely

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fashion in investigating and handling any and all requests for coverage under the Federal Policy.

Twenty-first Defense

The Complaint is barred because Federal had and has reasonable grounds to dispute coverage with respect to the matters for which CMC is seeking coverage.

Twenty-second Defense

The Complaint is barred because CMC acted in bad faith.

Twenty-third Defense

The Complaint is barred by Federal's right of set-off, recoupment and reimbursement to the full extent of any and all amounts previously paid to CMC under the Policy.

Twenty-fourth Defense

Any request for extra-contractual and/or exemplary damages is barred because the application of such damages to Federal in this action would violate Article I, §§7, 15 and 17 of the California Constitution, Article IV, §16 of the California Constitution and/or the Fifth, Eighth and Fourteenth Amendments of the United States Constitution by, inter alia, depriving Federal of due process and equal protection of the laws, not limiting the discretion of the trier of fact as to the amount of exemplary damages, subjecting Federal to impermissibly vague, imprecise, inconsistent standards and imposing cruel and unusual punishment or excessive fines or other impermissible punishment.

Twenty-fifth Defense

Federal affirmatively asserts any other matter that constitutes avoidance or a defense under applicable law. Federal reserves the right to interpose any and all defenses available to it under federal and state law which may be applicable to this action as they become available or apparent, or as they may be established during

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discovery and by the evidence in this case. Federal reserves the right to amend its answer to assert such additional defenses.

WHEREFORE, having fully answered the Complaint, Federal respectfully requests that the Complaint be dismissed, that the Court enter judgment in favor of Federal and that the Court grant Federal such other and further relief as it may deem just and proper.

Date: February 27, 2008

Respectfully submitted,

RUDLOFF WOOD & BARROWS LLP

By: _____

G. Edward Rudloff, Jr.
Kevin A. Norris

Of counsel:
David Newmann (admitted *pro hac vice*)
Joseph A. Bailey III (admitted *pro hac vice*)
HOGAN & HARTSON L.L.P.

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FEDERAL INSURANCE COMPANY

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EXHIBIT D

PILLSBURY & LEVINSON, LLP

ATTORNEYS AT LAW

RICHARD D. SHIVELY

March 28, 2007

Via Fedex Overnite

Chubb Group of Insurance Companies
12 VREELAND ROAD
FLORHAM PARK, NJ 07932-9095
ATTN: HENRY NICHOLLS, ESQ.

RLI INSURANCE COMPANY
525 W. VAN BUREN STREET, SUITE 350
CHICAGO. IL 60607
ATTN: AMY E. JOHNSON

Hartford/Twin City
2 Park Avenue
New York, NY 10016
Attn: Jeremy Salzman, Esq.

COVERAGE

Executive Protection Portfolio (D&O, Fiduciary, Crime & EPL)

Primary D&O
Insured: Crowley Maritime Corporation
Policy Period: 11/1/2004-11/1/2005
Insurer: Federal Insurance Company (Chubb)
Limit: $10M Term Aggregate XS $500K retention, each loss
Policy Number: 8120-0792

First XS D&O
Insured: Crowley Maritime Corporation
Policy Period: 11/1/2004-11/1/2005
Insurer: Hartford/Twin City
Limit: $10M Aggregate XS $10M Underlying Limits
Policy Number: 00 DA 0100967 04

Second XS D&O
Insured: Crowley Maritime Corporation
Policy Period: 11/1/2004-11/1/2005
Insurer: RLI Insurance Company
Limit: $5M Aggregate XS $20M Underlying Limit
Policy Number: EPG0002704A

CLAIM

CIVIL PROCEEDING: FRANKLIN BALANCE SHEET INVESTMENT FUND, ET AL.
V.
CROWLEY MARITIME CORPORATION BOARD OF DIRECTORS
V.
CROWLEY MARITIME CORPORATION
(NOMINAL DERIVATIVE DEFENDANT)

DATE OF CLAIM/SERVICE: 12/1/04
DESCRIPTION: STATUS REPORT
EXPENSE TO DATE: $574,911.87
OUR REF# 04DO0001
CHUBB REF#: 100304
HARTFORD REF#: 05360917
RLI REF#: 00176418

Interested Underwriters:

This firm has been retained to represent your insured, Crowley Maritime Corporation ("Crowley"), in connection with its claim for insurance coverage for the referenced action (the "Franklin Fund Action"). We are writing to inform you that an opportunity has arisen to settle the action on favorable terms, and to seek your consent to pursue such a settlement.

The settlement opportunity arose when the plaintiffs in the Franklin Fund Action offered to dismiss their lawsuit if they and the other unaffiliated holders of Crowley common stock were given an opportunity, through a tender offer, to sell their common stock for $2,990 per share in cash. A proposed settlement on those terms has not yet been consummated, and is subject to three contingencies. First, the tender offer must be accepted by a prescribed proportion of the unaffiliated common stock holders. Second, the proposed settlement must be approved by the Delaware Chancery Court. Third, the lawsuit must be dismissed and the time for an appeal must expire.

The proposed settlement would be in the best interest of both Crowley and its D&O insurers for two reasons. First, it would eliminate the potential for a large judgment against Crowley that might well be covered under the policies referenced above. Second, it would result in Crowley no longer being a public company -- which, in turn, would reduce the potential for future claims that might trigger coverage under the referenced policies.

After the plaintiffs had initiated the idea of a buyout to settle the Franklin Fund Action, Crowley was constrained by significant confidentiality issues that prevented it, as a practical matter, from immediately inviting its D&O carriers to join in the negotiations. Those issues related not only to applicable SEC disclosure rules, but also to financing arrangements necessary to fund the proposed purchase of the plaintiffs' shares.

The proposed settlement includes a provision that would require Crowley to pay attorneys' fees and costs incurred by the plaintiffs in prosecuting the Franklin Fund Action. Crowley would be looking to its carriers to cover -- among other costs of the settlement -- those fees and costs, as well as Crowley's own defense costs in excess of its self insured retention. However, before unequivocally accepting the plaintiffs' settlement offer and proceeding to complete the settlement, Crowley is asking its carriers to consent to the proposed settlement.

There is a court hearing on the proposed settlement set for April 27, 2007. We would appreciate hearing from you as soon as possible, so that Crowley can proceed, if possible, to seize this opportunity to obtain a favorable settlement.

Very truly yours,

PILLSBURY & LEVINSON, LLP

Philip L. Pillsbury, Jr.
Richard D. Shively

By _____
Richard D. Shively

EXHIBIT D PAGE 35

bcc: Art Mead, Esq.
Steven Ficon
Philip L. Pillsbury, Jr.

EXHIBIT D PAGE 36